IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-562

ROSEBUD SIOUX TRIBE, *Petitioner,*

v.

HONORABLE RICHARD KNEIP, ET AL., *Respondents.*

On Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF AMICI CURIAE

of

The National Congress of American Indians
The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana
The Shoshone Tribe of the Wind River Reservation, Wyoming
The Sisseton and Wahpeton Sioux Tribe of the Devils Lake Reservation, North Dakota
The Standing Rock Sioux Tribe of North Dakota and South Dakota

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MOTION FOR LEAVE TO FILE BRIEF

and

BRIEF OF AMICI CURIAE

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

The National Congress of American Indians; the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana; the Shoshone Indian Tribe of the Wind River Reservation, Wyoming; the Sisseton and Wahpeton Sioux Tribe of the Devils Lake Reser-

vation, North Dakota; and the Standing Rock Sioux Tribe of North Dakota and South Dakota respectfully move for leave to file a brief as amici curiae in this case in support of petitioner, which brief is set out herein following this motion. The written consent of petitioner is filed herewith. The consent of respondents was sought, and respondents have informed amici that they intend to file with the Court a blanket consent to all timely amicus curiae briefs.

INTEREST OF AMICI CURIAE

The issue before the Court is whether any part of the Rosebud Sioux Indian Reservation was terminated by the allotment and surplus land acts adopted in 1904, 1907 and 1910. The law interpreting this type of statute is now at a crossroads. In its previous decisions in *Seymour*,[1] *Mattz*,[2] and *DeCoteau*,[3] the Court has interpreted allotment and surplus land statutes, but the precise terms of the statutes interpreted in each of those cases have not been widely used in other enactments. By contrast, the terms in one or another of the three Rosebud Acts are nearly identical to the terms of numerous other allotment and surplus land statutes affecting many tribes across the United States. Each of the amici tribes is affected by a statute almost identical in form and language with one or another of the Rosebud Acts. All of the Fort Peck Reservation, all of the Devils Lake Reservation, all of the Standing Rock Reservation, and over two-thirds of the Wind River Reservation, were opened by such statutes and would

[1] Seymour v. Superintendent, 368 U.S. 351 (1962).

[2] Mattz v. Arnett, 412 U.S. 481 (1973).

[3] DeCoteau v. District County Court, 420 U.S. 425 (1975).

thus be in jeopardy of termination under the reasoning of the court below.

1. The National Congress of American Indians is a non-profit association of more than one hundred Indian tribes throughout the United States, maintaining offices in the District of Columbia. Its purpose is to promote the interest of American Indians through collective action. Many of its member tribes are potentially affected by the result in this case.

2. The Fort Peck Reservation was established by the Act of May 1, 1888, ch. 213, 25 Stat. 113. In 1907, the same Inspector McLaughlin who dealt with the Rosebud Sioux negotiated an agreement with the Assiniboine and Sioux Tribes opening all of the unallotted land on the reservation to settlement. The agreement was not ratified, but Congress enacted the Act of May 30, 1908, ch. 237, 35 Stat. 558, opening the unallotted and unreserved tribal lands for sale to settlers. The 1908 Fort Peck Act is similar in format to the 1907 and 1910 Rosebud Acts. Fort Peck has been assumed to be unterminated. *State ex rel. Bokas* v. *District Court*, 128 Mont. 37, 270 P.2d 396 (1954); *United States* v. *Burland*, 441 F.2d 1199 (9th Cir. 1971), *cert. denied*, 404 U.S. 842.

3. The Devils Lake Indian Reservation in North Dakota was established by the Treaty of February 19, 1867, 15 Stat. 505. The same Inspector McLaughlin who dealt with the Rosebud Indians negotiated an agreement with the Devils Lake Sioux for the sale of unallotted lands on the reservation. Congress did not ratify this agreement but instead enacted the Act of April 27, 1904, ch. 1620, 33 Stat. 319. This Act was passed four days after the 1904 Rosebud Act and in general contains the same language and provisions.

4. The Wind River Indian Reservation in Wyoming was established by the Treaty of July 3, 1868, 15 Stat. 673. It is occupied by the Shoshone and Arapaho Tribes; the Arapaho Tribe is separately represented. A brief history of the reservation is found in the opinion of this Court in *United States* v. *Mazurie,* 419 U.S. 544, 546 (1975).

In 1904 the same Inspector McLaughlin negotiated an agreement with the Wind River Indians in much the same form as the 1907 and 1910 Rosebud Acts. The Act of March 3, 1905, ch. 1452, 33 Stat. 1016, ratified the agreement with certain amendments. While this act opened about two-thirds of the reservation, relatively little of the land was entered by settlers because it was not suitable for homesteading. Most of the unsold land was later restored to the Tribes. The result is that today about 83% of the land within the reservation boundaries—including the opened two-thirds portion—is Indian owned. About 7% is federally owned and 10% is held in fee simple, mostly by non-Indians.

5. The Standing Rock Sioux Tribe is a sister tribe of the Rosebud Sioux. Both are part of the Sioux Nation that owned the Great Sioux Reservation established by the Treaty of April 29, 1868, 15 Stat. 635. Standing Rock and Rosebud were two of the six Sioux Tribes for whom separate reservations were made in the Act of March 2, 1889, ch. 405, 25 Stat. 888. The Standing Rock Reservation is located in both the States of North and South Dakota.

The same Inspector McLaughlin twice came to the Standing Rock Sioux Tribe. As a consequence, two allotment and surplus land statutes opened up all the unallotted land on the Standing Rock Reservation. Act

of May 29, 1908, ch. 218, 35 Stat. 460; Act of February 14, 1913, ch. 54, 37 Stat. 675. In form and language these statutes are practically the same as the 1907 and 1910 Rosebud Acts.

The 1908 Act fixed a boundary line running north and south approximately through the center of the reservation and opened to settlement the western half of the reservation in both states. Five years later the 1913 Act opened the eastern half of the Standing Rock Reservation in both states.

The 1908 Act included both the western half of the Standing Rock Reservation and a portion of the Cheyenne River Reservation. In 1973 the Eighth Circuit Court of Appeals held that the 1908 Act did not terminate any part of the Cheyenne River Reservation. *United States ex rel. Condon* v. *Erickson,* 478 F.2d 684 (8th Cir. 1973).

The 1913 Act, which opened the eastern half of the Standing Rock Reservation, has been construed by the federal district courts for North Dakota and South Dakota. These courts have split on the question whether this act terminated the eastern half of the reservation. That portion of the eastern half of the reservation in South Dakota was held not to be a reservation in *United States* v. *Long Elk,* 410 F. Supp. 1174 (D.S.Dak. 1976), *appeal pending.* The part of the eastern half of the reservation in North Dakota was held to be a reservation in *United States* v. *Bird Horse,* Cr. 75-47 (D. N.Dak.), *appeal pending.* A dictum in the *Long Elk* case casts doubt upon the present validity of the holding in *United States ex rel. Condon* v. *Erickson, supra,* concerning the western half of the reservation, at least that portion in South Dakota.

6. As noted, all of the acts concerning amici tribes resemble one or another of the Rosebud Acts. One feature that all eight of these statutes have in common is that the United States expressly disclaimed any obligation to purchase or to find purchasers for any of the lands opened to homesteading and settlement. In each case, the United States expressly assumed the role of trustee to find purchasers for the opened lands.

SUMMARY OF ARGUMENT

The three Rosebud Acts at issue here, and over one hundred others, were patterned after the General Allotment Act of 1887. All the allotment acts contemplated the eventual assimilation of the Indians and the termination of their reservations. But this was not to occur until the end of the trust period on the Indians' allotments, until which time the reservation system was to continue. The trust period was originally intended to last twenty-five years, but in 1934 the allotment policy was repudiated, and the trust period has been extended on all trust allotments. Thus the intent of the allotment acts has never been carried out.

Many of the allotment acts also provided for the opening of "surplus" reservation lands for sale to homesteaders. The surplus land sales provisions are not inconsistent with continued reservation status; in the *Mattz* and *Seymour* cases, the Court found that areas opened to homesteaders nevertheless remained within the boundaries of those Indian reservations. However, in the *DeCoteau* case, the Court found that an outright sale of all unallotted lands for present consideration terminated the reservation. As stated above, all three statutes contemplated the eventual termination of the Indians; the essential difference between the *DeCoteau*

statute and the *Mattz* and *Seymour* statutes was not whether termination was to occur, but when it was to occur.

In the *DeCoteau* opinion, the Court reaffirmed its holdings in *Mattz* and *Seymour,* and based the decision on differences between the statutes involved. The first and most prominent distinction mentioned was between the outright sale for present consideration of the opened lands in *DeCoteau*, and the opening arrangement in *Mattz* and *Seymour*. In the latter case the Indians' surplus lands were made available for sale to homesteaders, but the Indians received payment only when and if the homestead entry was made and paid for. This same distinction had been the basis of the Court's 1902 decision in *Minnesota* v. *Hitchcock,* 185 U.S. 373 (1902). There the Court construed the arrangement opening Indian lands to uncertain future sales to continue the opened lands as Indian trust lands until actually sold and paid for; the lands did not become public domain. The Interior Department has consistently relied on the same distinction in determining which lands are available for restoration to tribal ownership under the Indian Reorganization Act of 1934.

In both *Mattz* and *Seymour,* where the Indians remained beneficial owners of the opened lands until actually compensated, the Court found that the reservation boundaries remained intact until the end of the trust period on the allotments. The three Rosebud Acts were based on the same arrangement. Pending sale and full payment for the lands, the Indians retained a trust interest in the opened areas. Thus to accept the result of the Court of Appeals, one must conclude that Congress intentionally left the tribe owning trust property outside the reservation.

It is conceded by respondents that Congress in enacting the three Rosebud statutes did not address the question of reservation boundaries. At that time, the importance of reservation boundaries in Indian affairs was much less than it is today for a number of reasons. Nevertheless, the Court of Appeals inferred termination of the boundaries from the legislative history and surrounding circumstances. However, the bases for the court's conclusion will not withstand analysis.

The Court minimized the importance of the distinction between a purchase for present consideration and an opening for uncertain future sales, failing to take into account the Court's decision in *Minnesota* v. *Hitchcock, supra.* The Court of Appeals instead relied on the language of cession in the three Rosebud Acts, and on the phrase "diminished reservation" in a proviso to the 1910 Act and in contemporary documents. The court also relied on the school lands sections in those acts.

The language of cession in the Rosebud Acts does not respond to the issue in this case, whether termination was to occur immediately or only after expiration of the trust period on the Indian allotments. Cession would occur only as each parcel was sold and paid for, because prior to that time the Indians were not compensated, were surely not making a gift, and the United States was not exercising its power of eminent domain.

The references to the diminished reservation likewise do not specify when such diminishment was to occur. Furthermore, such references in all probability refer to diminishment in tribal land ownership rather than reservation boundaries. Under the contemporary "title theory" of Indian country jurisdiction, each parcel of land was thought to lose its Indian country character upon sale to a homesteader. This rule was not authoritatively changed until the 1948 enactment of 18 U.S.C. § 1151. Thus a contemporary congressman would have thought that as each parcel was sold, it diminished the trust area, regardless of the reservation boundaries. This Court has recently used the term diminished in the same manner in *Moe* v. *Confederated Salish and Kootenai Tribes,* —— U.S. ——, 48 L.Ed.2d 96 (1976).

In relying on the school lands sections in the Rosebud Acts, the Court of Appeals failed to take into account that these sections were almost certainly a counter to this Court's decision in *Minnesota* v. *Hitchcock.*

On the face of the Rosebud Acts, there is no basis to infer an intent to terminate the opened areas of the reservation. Indians were not to be removed from these areas. In one area the Tribe retained the timberlands, the Government retained land in two of the areas for federal Indian agencies, schools, and missions, and the Indians continued to own the lands opened to homesteaders until such lands were actually sold and paid for, a process taking several years and leaving the Indians as trust owners of land never sold. While the Acts use words of cession, these are fully consistent with the interpretation that cession was to occur only to the extent of actual sales and payment in the future, parcel by parcel. The United States expressly disclaimed an intent to exercise its power to take the opened lands except for school sections. These statutes closely parallel the statutes construed in *Mattz* and *Seymour.*

It is clear from the historical context and legislative history that Congress was not focusing on the boundary question and that the term "diminished reserva-

tion" did not have the meaning attributed to it by the Court of Appeals.

For these reasons, none of the Rosebud Acts exhibits the clear intent to effect an immediate termination of the affected areas required by the rules set down in the decisions of this Court.

ARGUMENT

CONGRESS INTENDED TO TERMINATE THE OPENED PORTIONS OF THE ROSEBUD RESERVATION, BUT ONLY AFTER EXPIRATION OF THE TRUST PERIOD ON THE INDIAN ALLOTMENTS.

A. Introduction

The opinion of the Court of Appeals appears to pose the issue in this case as whether Congress intended to terminate the opened portions of the Rosebud Reservation by enactment of the three Rosebud Acts. Amici suggest that this is not accurate. As will be elaborated herein, all the allotment statutes patterned after the General Allotment Act intended to terminate federal protection over Indians and their property and to break up their tribal relations. However, such termination was not to occur immediately but only after all the lands were allotted and the trust period on the allotments had expired. *Mattz* v. *Arnett,* 412 U.S. 481, 496 (1973). The Indian Reorganization Act of 1934 reversed this policy, but eventual termination was clearly the intent of the allotment acts Congresses.

Eventual termination was equally the goal of Congress in enacting the statutes interpreted by this Court in *Mattz* and *Seymour*[4] as well as in *DeCoteau.*[5] The

[4] *See* note 1 *supra.*

[5] *See* note 3 *supra.*

same is true as well of allotment statutes not accompanied by opening of the surplus Indian lands to homesteaders. In all these cases, the allotments themselves and the Indians were to remain under federal protection for the duration of the trust period. The crucial question in these cases then is whether the land that was made available to non-Indian homesteaders was to remain within the reservation until the expiration of the trust period on the Indian allotments, or, as the state contends, the reservation was to be terminated immediately.

The difference between the *Mattz* and *Seymour* statutes and the *DeCoteau* statute is not *whether* termination was to take place, but *when* it was to take place. In *DeCoteau,* where the Indians immediately sold all interest in the ceded lands, the reservation was immediately reduced to the allotments. By contrast, in *Mattz* and *Seymour* the "surplus" lands were merely made available for uncertain future sales to settlers. Until sold and paid for, the opened lands remained Indian trust lands, with the Indians entitled to the mesne profits. In these two cases, the Court found insufficient indication of intent to terminate the reservation boundaries immediately and to reduce the area of protection to the allotments alone; rather, the reservation was to continue until the end of the trust period on the allotments.

In this critical respect the three Rosebud statutes resemble those construed in *Mattz* and *Seymour.* It is amici's position that this functional difference between an immediate cash sale and uncertain future sales is the most reliable indicator we have of Congressional intent whether termination was to occur immediately

or not until the end of the allotment trust period—a much more reliable indicator than the factors relied upon by the Court of Appeals. It is also the criterion that the Interior Department has consistently applied for many years in determining the status of opened reservations generally.

B. All the Allotment Statutes Contemplated the Eventual Assimilation of Indians. But the Reservation System Continued in Force.

In 1887 Congress enacted the General Allotment Act, ch. 119, 24 Stat. 388, *as amended,* 25 U.S.C. §§ 331-358. Between 1880 and 1934, Congress enacted more than 100 special allotment acts patterned upon the General Allotment Act but applying to particular Indian reservations.[6] The three Rosebud Acts at issue herein are among the latter[7] as are the statutes involving each of the four *amici* tribes.[8]

Prior to the period of the General Allotment Act, treaties and agreements by which the United States acquired lands from Indians had customarily provided for outright cession of Indian lands for immediate consideration and removal of the Indians from the ceded areas. The General Allotment Act and its progeny brought about a significant change: the Indians were no longer to be removed. As the Court noted in *Minnesota* v. *Hitchcock,* 185 U.S. 373, 401-402 (1902):

[6] While older allotment acts and treaty provisions exist, the first act on the model of what became the General Allotment Act appears to be the Act of June 15, 1880, ch. 223, 21 Stat. 199. Allotments were, of course, prohibited after 1934. 25 U.S.C. § 461.

[7] Act of April 23, 1904, ch. 1484, 33 Stat. 254; Act of March 2, 1907, ch. 2536, 34 Stat. 1230; Act of May 30, 1910, ch. 260, 36 Stat. 448.

[8] Cited above under "Interest of Amici Curiae."

> [M]uch of the legislation in respect to Indians and many of the treaties with them have contemplated simply the cession of their lands and their removal to tracts further west. . . . Of course, when the Indian tribe has been removed by treaty from one body of land to another the interest of the tribe in the land from which it has been removed ceases, and the full obligation of the government to the Indians is satisfied when the pecuniary or real-estate consideration for the cession is secured to them. But in some instances, and this is one of them, the Indians have not been removed from one reservation to another, but the government has proceeded upon the theory that the time has come when efforts shall be made to civilize and fit them for citizenship. Allotments are made in severalty, and something attempted more than provision for the material wants of the Indians.

When the Indians were removed and had no further interest in the lands ceded, it was obvious that the area acquired by the United States ceased to be an Indian reservation or Indian country. But under the 1880-1934 allotment statutes, the reservation system was to continue during the trust period on the allotments.

These allotment statutes were unquestionably intended to end the tribal organization of the Indians eventually and to withdraw federal protection from them and their property—a process which would include termination of their reservations. As the Court said in *United States* v. *Celestine,* 215 U.S. 278, 290 (1909):

> Of late years a new policy has found expression in the legislation of Congress, —a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship, and charged with all the rights and obligations of citizens of the United States.

However, it is equally clear that assimilation was not to occur in one step, and that allotment was but the first stage of the process. In a case arising in Tripp County, South Dakota, the area that is the subject of the 1907 Rosebud Act, the Court stated:

> The Act of 1889 recognized the existence of the tribe, as such, and plainly disclosed that the tribal relation, although ultimately to be dissolved, was not to be terminated by the making or taking of allotments. In the acts of March 3, 1899 (chap. 450, 30 Stat. at L. 1362), and March 2, 1907 (chap. 2536, 34 Stat. at L. 1230), that relation was recognized as still continuing, and nothing is found elsewhere indicating that it was to terminate short of the expiration of the trust period.
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> Upon examining the whole act, as must be done, it seems certain that the dissolution of the tribal relation was in contemplation; but that this was not to occur when the allotments were completed and the trust patents issued is made very plain. To illustrate: Section 5 expressly authorizes negotiations with the tribe, either before or after the allotments are completed, for the purchase of so much of the surplus lands "as such tribe shall, from time to time, consent to sell;" directs that the purchase money be held in the Treasury "for the sole use of the tribe;" and requires that the same, with the interest thereon, "shall be at all times subject to appropriation by Congress for the education and civilization of such tribe . . . or the members thereof." This provision for holding and using these proceeds, like that of withholding the title to the allotted lands for twenty-five years, and rendering them inalienable during that period, makes strongly against the claim that the national guardianship was to be presently terminated. The two together show that the government was retaining control of the property of these Indians, and the one relating to the use by Congress of their moneys in their "education and civilization" implies the retention of a control reaching far beyond their property.

United States v. *Nice,* 241 U.S. 591, 596, 599 (1916). More recently, the Court stated:

> [The General Allotment] Act permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished.
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> * * *
>
> [A]llotment under the 1892 [special allotment] Act is completely consistent with continued reservation status.

Mattz v. *Arnett,* 412 U.S. 481, 496-497 (1973).

Congress underscored the intent of its plan by the 1906 amendment to the General Allotment Act known as the Burke Act, ch. 2348, 34 Stat. 182 (1906), now part of 25 U.S.C. § 349. Its author, Congressman Burke of South Dakota, played a prominent role in the enactment of the Rosebud Acts. The 1906 amendment expressed the disagreement of Congress with this Court's decision in *In re Heff,* 197 U.S. 488 (1905). In *Heff,* the Court had interpreted § 6 of the General Allotment Act of 1887 to remove federal liquor protection from allotted Indians immediately upon issuance of a trust patent. This decision "startled the country"[9]

[9] 1906 Report of the Commissioner of Indian Affairs, page 28.

and led to the Burke Act, which specified that allotted Indians "shall be subject to the exclusive jurisdiction of the United States" until expiration of the allotment trust period. 25 U.S.C. § 349. The *Heff* case was later expressly overruled by the Court. *United States* v. *Nice*, *supra*, 241 U.S. at 601.

The plan of all the allotment acts was that after a suitable "apprenticeship in civic responsibilities,"[10] originally contemplated to last 25 years, the federal protection of Indians and their property would come to an end. In the original draft of the General Allotment Act, this period was absolute, but it was amended prior to enactment to permit the President to extend the period in his discretion. 18 Cong. Rec. 189, 225 (Dec. 15-16, 1886, 49th Cong. 2d Sess.). *See also* 25 U.S.C. § 391.

In 1934 the policies of the allotment acts were repudiated. *Mattz* v. *Arnett*, *supra*, 412 U.S. at 496 n. 18. Congress ended the making of allotments and extended indefinitely the trust period on many allotments, 25 U.S.C. § 462, and the President and Congress have extended others. 25 C.F.R. Appendix. The trust periods of allotments on the Rosebud Reservation were extended for 10 years by four executive orders between 1926-1931, then indefinitely by 25 U.S.C. § 462. *Id.* For this reason, the original plan of Congress in enacting the allotment acts has never been carried out.

The General Allotment Act and many of the special allotment acts of the 1880-1934 period not only provided for allotment of tribal land in severalty to the Indians but also contemplated the sale of unallotted or

[10] 1906 Report of the Commissioner of Indian Affairs, page 29.

"surplus" tribal lands to homesteaders. 25 U.S.C. § 348; *Mattz* v. *Arnett*, *quoted* p. 15 *supra*.

The Court has clearly held that such opening of surplus reservation lands for sale to homesteaders is in no way inconsistent with continued reservation status. "Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging the Indians to adopt white ways." *Mattz* v. *Arnett*, *supra*, 412 U.S. at 496. "The [special allotment] Act did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." *Seymour* v. *Superintendent*, 368 U.S. 351, 356 (1962). Quite recently the Court rejected an argument that the resulting integration of Indians with settlers had the effect of eliminating reservation status, when the reservation population was only 19% Indian. *Moe* v. *Confederated Salish & Kootenai Tribes*, —— U.S. ——, 48 L.Ed.2d 96, 102-103, 108 (1976).[11] Respondents' similar argument regarding the racial composition of the opened areas of the Rosebud Reservation should be rejected for like reasons.

In summary, the plan of the allotment acts was to assimilate the Indians in two stages. The first stage involved the allotment in severalty of tribal land to "individualize" the Indians and make them into family farmers, together with the opening of allotted reser-

[11] The Moe case involved the Flathead Reservation in Montana. It is noteworthy that the act opening that reservation to white settlement was passed the same day as the 1904 Rosebud Act and has quite similar provisions. Act of Apr. 23, 1904, ch. 1495, 33 Stat. 302.

vation areas to white settlement to promote interaction of the races and provide white farmers as role models for the Indians. The reservation system with federal protection for the Indians was to continue during this phase.

The second phase was to be the termination of the trust and withdrawal of federal protection. The reservations would then wither away as needless anachronisms. This phase was never reached, however, because in the interim the allotment system was recognized to be a failure and was repudiated. *Moe* v. *Confederated Salish and Kootenai Tribes, supra,* 48 L.Ed.2d at 109-110.

C. When Reservation Lands Are Merely Opened to Uncertain Future Sales, the Indians Retain Beneficial Ownership Until the Lands Are Actually Sold and Paid For.

In *Seymour* v. *Superintendent, supra* and *Mattz* v. *Arnett, supra,* the Court ruled that the allotment and surplus land statutes at issue in those cases did not then terminate the reservation areas so opened. But in *DeCoteau* v. *District County Court, supra,* the Court ruled that the statute there at issue terminated the Lake Traverse Reservation in South Dakota. However, the Court forcefully stated that *Mattz* and *Seymour* remain the law, and the difference in result was traced to differences in the statutes being interpreted. 420 U.S. at 447. In the *DeCoteau* opinion, the Court noted several differences between the statute there involved and those in *Mattz* and *Seymour*. 420 U.S. at 447-449. The first and most prominent distinction in the Court's opinion in *DeCoteau* between the Lake Traverse statute and those interpreted in *Mattz* and *Seymour* was that Lake Traverse involved an outright purchase by the United States, while the *Mattz* and *Seymour* stat-

utes "benefitted the tribe only indirectly, by establishing a fund dependent on uncertain future sales of its land to settlers." 420 U.S. at 448.

This distinction between outright sale for present consideration and lands opened for uncertain future sales was called to the attention of the court below, and it purported to take it into account, although giving it little weight. *Rosebud Sioux Tribe* v. *Kneip,* 521 F.2d 87, 101-102 (8th Cir. 1975). That court reached its result based in part on its assumption that the arrangement whereby the Government holds the lands in trust for sales to settlers originated in 1904. 521 F.2d at 102. This is clearly wrong. The *Mattz* case involved an 1892 statute which also employed this form of opening, and the same is true of other acts scattered throughout the allotment and surplus land statute period. *Restoration of Lands Formerly Indian to Tribal Ownership,* 54 I.D. 559, 563 (1934). Six of the allotment and opening statutes listed in this Interior Solicitor's opinion pre-date 1904."[12]

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[12] The Court of Appeals' error on this point traces to a law review article co-authored by one of the counsel for respondents. The article quotes legislative history in support of this contention. Comment, *New Town et al.: The Future of an Illusion,* 18 S.Dak. L.Rev. 85, 88-89, 96 (1973). The probable explanation is the existence by 1904 of the Free Homesteads Act of 1900, ch. 479, 31 Stat. 179. Under this statute had the United States purchased the Rosebud lands outright, settlers would be entitled to claim them as free homesteads, and the Government would not recover any of the consideration it paid the Indians. As this Court noted in DeCoteau, this was not true with regard to the 1891 statute there reviewed which purchased lands from seven tribes outright. All of these lands were to be sold to settlers to recoup the price. 420 U.S. at 439-441. Thus the overall situation in 1904 would appear to be different, even though opening of reservations in trust for uncertain future sales was not new.

One of the six statutes just referred to was construed by the Court in *Minnesota* v. *Hitchcock,* 185 U.S. 373 (1902), and the entire decision in that case turned on the distinction between Indian lands purchased outright and reservations opened in trust to uncertain future sales. Minnesota was entitled under its enabling act to school lands sections in the public domain. The State claimed the school lands sections within the Red Lake Indian Reservation, which had been opened to settlement with payment to the Indians only as each parcel was sold and paid for. The Court denied the State's claim, ruling that the school land sections had not become public domain, because the Indians retained an interest in the opened lands until actually sold.

Congress was certainly aware of this case, because it had waived the immunity of the United States by a special statute to allow the Court to hear any case to determine the right of a state to claim school lands within any Indian reservation or cession. Act of March 2, 1901, ch. 808, 31 Stat. 950. *Minnesota* v. *Hitchcock* was announced on May 5, 1902, after which date Congress surely knew the significance of the distinction between the outright purchase of Indian lands and the opening in trust of Indian lands for future sales.

As noted in the previous section, the essential difference between the allotment and surplus land statutes at issue in *Seymour* and *Mattz* and that at issue in *DeCoteau* is not whether termination was intended by Congress, but when it was intended. To be sure, this distinction has grown in importance owing to the indefinite extension of the trust period on allotments. But the focus here must be on the perspective of the Congress during the first decade of this century.

In all cases, the trust relationship was to continue as to the allotments themselves, and tribal relations were to continue, for the twenty-five year period. *Mattz* v. *Arnett, supra; United States* v. *Nice, supra.* The allotments themselves remained "Indian country" regardless of the status of the reservation boundaries. *United States* v. *Pelican,* 232 U.S. 442 (1914). But in *Mattz* and *Seymour,* the opened lands also remained Indian trust property until actually sold to and paid for by settlers. *Ash Sheep Co.* v. *United States,* 252 U.S. 159 (1920); *Minnesota* v. *Hitchcock,* 185 U.S. 373 (1902); *see also* F. Cohen, *Handbook of Federal Indian Law* (1942 ed., 1971 reprint, U.N.Mex. Press), pp. 334-336. The Indians retained the right to the income from these unsold lands. 58 I.D. 203 (1942). The Indians' retained interest distinguished these lands from lands purchased outright and was ruled by the Interior Department to justify restoration to the Indians of the opened trust lands, but not the sold lands, under the Indian Reorganization Act. 54 I.D. 559 (1934), interpreting 25 U.S.C. § 463. It is true as respondents urged in their final brief in opposition to certiorari (dated May 1976 at pp. 23-27) that the Interior Department avoided a decision on original reservation boundaries in 56 I.D. 330 (1938). However, boundaries were not then at issue, and in any event that was the pre-1948 era of the "title" theory of Indian country discussed *infra.* The point here is that the Indians retained a significant ownership interest in unsold lands opened for possible sale, an interest recognized by the Interior Department in determining what lands would be restored to full tribal ownership.

By contrast, in *DeCoteau* v. *District County Court, supra,* the Indians retained no interest whatsoever in

the ceded lands, which became public domain. 420 U.S. at 449.

Thus in both *Mattz* and *Seymour,* where the Indians were not to be removed, and they remained beneficial owners of the opened lands until actually compensated, the Court found that the reservation boundaries remained intact until the end of the trust period on the allotments. All three of the Rosebud Acts were based on the same premise: the allotted Indians remained, and the Tribe continued to have an interest in the unallotted lands until actually sold to and paid for by settlers.

Amici do not contend that lands opened for uncertain future settlement, in which the Indians retain a trust interest, must for that reason alone remain within reservation boundaries. Other factors could overcome the strong inference to be drawn from this arrangement, notably complete Indian removal from the opened area or express abolition on the face of the act. However, neither of these factors is present in any of the Rosebud Acts.

To reach the Court of Appeals' conclusion that the opened Rosebud Reservation was terminated, one must assume that Congress intended to terminate an area in which allotted Indians were to remain in trust for 25 years, in which the Rosebud Sioux Tribe was to retain a trust interest in the opened lands for some years to come, in which federal Indian agencies and schools remained, and in one case where the Tribe continued to own timber lands in trust. 1910 Act § 4. Amici contend that it requires a particularly strong showing of intent to terminate to overcome these factors. As will be set out in the next section, the circumstances surrounding the enactment of the Rosebud statutes do not support a finding of such intent.

D. The Court of Appeals' Stated Grounds for Its Finding of Intent to Terminate Will Not Withstand Analysis.

The Court of Appeals recognized the general rules governing termination cases: that Congressional intent to terminate a reservation must be expressed on the face of the act or clear from the surrounding circumstances to overcome the rule that doubtful expressions are to be resolved in favor of the Indians. 521 F.2d at 90. In the case of the allotment statutes, all of which envisioned eventual termination, the issue should be refined to require that Congressional intent to terminate immediately, rather than after the allotment trust period, be express or otherwise clear.

In regard to the Rosebud Acts, neither side in this case has been able to indicate that Congress at any time directly addressed the question of reservation boundaries. Indeed, one of the counsel for respondents in a law review comment on these Acts admits "the almost complete lack of Congressional concern with the boundary issue."[13]

This concession is clearly correct. The difference between immediate termination and termination after the allotment trust period would have then seemed relatively unimportant, since termination was to occur after 25 years in any event. There had not yet occurred the establishment of federally-organized tribal governments under the Indian Reorganization Act of 1934, 25 U.S.C. § 476, which increased the significance of reservation boundaries. And as will be elaborated below, the then prevailing theory of federal Indian country jurisdiction depended upon land title, not on reser-

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[13] Comment, *New Town et al.: The Future of an Illusion, supra* n. 12, 18 S.Dak. L.Rev. at 117 (1973).

vation boundaries alone, a theory not discarded until the 1948 enactment of 18 U.S.C. § 1151.

The boundary question received no attention, so the inquiry throughout this case has been whether termination of the boundaries could be inferred from other events.

The Court of Appeals found that termination of the opened portions of Rosebud could be inferred from the surrounding circumstances and legislative history. As noted above, that court minimized the significance of the uncertain future sales arrangement based in part on the court's mistaken view that this arrangement was new in 1904—despite the express recognition two years earlier by this Court of the importance of that distinction in *Minnesota* v. *Hitchcock, supra.*

The Court of Appeals placed principal reliance on the language of cession in the Rosebud Acts; on the reference to the "diminished reservation" in a proviso to the 1910 Rosebud Act; and on references to the "diminished reservation" and the like in contemporary documents. The court also relied on the school lands sections in the Rosebud Acts.

(1) THE CESSION LANGUAGE. While each Rosebud Act uses language of cession, this in no way answers the issue in this case. Again, the question is not whether cession was to occur but when. In the Rosebud statutes, the Indians as already noted retained an interest in the opened lands until a homestead entry was made and the land fully paid for (the payment process usually taking several years). Only after full payment would cession of each parcel occur. While the authority for the cession would trace to the statute, the cession would

occur only when the Indian interest was fully extinguished. To construe the cession terms otherwise would make the transaction into a gift until and if payment were made, a construction not to be favored under the governing rules of Indian law. (An eminent domain taking is, of course, negated by the section in each Act disclaiming any payment obligation of the United States except as to school lands. 1904 Act § 6; 1907 Act § 8; 1910 Act § 11.)

Cession under the Rosebud Acts occurred in exactly the same manner as under the *Mattz* and *Seymour* acts —piecemeal as each parcel was sold and paid for. The Court in those cases found this arrangement not to support a Congressional intent to terminate the opened reservation immediately—only after the allotment trust periods had expired.

(2) THE REFERENCES TO THE DIMINISHED RESERVATION.

The references to the diminshed reservation and similar phrases likewise do not address the question of when such diminishment was to occur. Furthermore, it is probable that "diminished" referred to title to the opened lands rather than to reservation boundaries. The contemporary theory was that the Indian country authority of the United States depended upon the title to each parcel of land rather than on the location of the outer boundaries of an Indian reservation.

This "title theory" of Indian jurisdiction traces to *Bates* v. *Clark,* 95 U.S. 204 (1877). At that time, the statutory assertion of federal authority was over "Indian country" as that phrase had been used in the various Indian trade and intercourse acts beginning

with the Act of July 22, 1790, ch. 33, 1 Stat. 137. The single most prominent subject was liquor control, and *Bates* v. *Clark* was a liquor case. The *Bates* Court ruled against Indian country authority, a result that seems obvious in any event because the place where the case arose was not within any Indian reservation. But the Court chose to rest its decision on land title rather than on reservation boundaries. Indian country was defined in these terms:

> The simple criterion is, that, as to all the lands thus described, it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further Act of Congress, unless by the Treaty by which the Indians parted with their title, or by some Act of Congress, a different rule was made applicable to the case.

95 U.S. at 208.

Bates v. *Clark* was followed and relied upon regarding fee patented lands within an opened reservation in *Dick* v. *United States,* 208 U.S. 340 (1908), and regarding a railroad right-of-way across a reservation in *Clairmont* v. *United States,* 225 U.S. 551 (1912).

In a case arising on the Rosebud Reservation, the Eighth Circuit cited *Bates* v. *Clark, supra,* in stating the court's view that federal court criminal jurisdiction on an Indian reservation depended upon title to each parcel of land. *Hollister* v. *United States,* 145 F. 773 (8th Cir. 1906) (dictum). This dictum was quoted and relied upon in *United States* v. *LaPlant,* 200 F. 92 (D.S.Dak. 1911) to deny federal jurisdiction over a crime occurring on opened lands on the Cheyenne River

Reservation in South Dakota. The court in *LaPlant* reasoned that "checkerboarding" of a reservation's jurisdiction would be troublesome, a policy judgment later adopted by this Court in *Seymour* v. *Superintendent, supra,* but the *LaPlant* court reached the opposite conclusion from *Seymour*. *LaPlant* was expressly overruled by *United States ex rel. Condon* v. *Erickson,* 478 F.2d 684, 688 (8th Cir. 1973) in reliance upon *Seymour*. The opinion in the *Condon* case expressly discusses the shift from the "title theory" of Indian jurisdiction to the boundary theory of *Seymour*. 478 F.2d at 688.

The rule of *Bates* v. *Clark, supra,* included an exception for any different rule imposed by act of Congress or treaty, and such exceptions were readily recognized. *Dick* v. *United States, supra,* 208 U.S. at 358-359; *Buster* v. *Wright,* 135 F. 947, 952 (8th Cir. 1905); *Kills Plenty* v. *United States,* 133 F.2d 292 (8th Cir. 1943), *cert. denied,* 319 U.S. 759. Also, there was some inconsistency in this Court's statement in *United States* v. *Celestine,* 215 U.S. 278, 285 (1909), that "when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." This language was quoted by the Court in both *Seymour,* 368 U.S. at 359, and *Mattz,* 412 U.S. at 504.

In 1932 Congress expressly included rights-of-way across Indian reservations within the jurisdiction of the Major Crimes Act. Act of June 28, 1932, ch. 284, 47 Stat. 336. But in 1942 Felix Cohen still did not view fee lands within Indian reservations to be Indian country. F. Cohen, *Handbook of Federal Indian Law* (1942 ed., 1971 reprint, U.N.Mex. Press), pp. 7, 359. This Court noted as much in *Seymour,* 368 U.S. at 357, n. 15.

In 1948 Congress resolved the question of fee lands by expressly including them in the definition of Indian country codified in 18 U.S.C. § 1151. This "anti-checkerboarding" policy was sustained in *Seymour* and more recently was even found to override the express grant of state jurisdiction in 25 U.S.C. § 349, when an Indian allotment is patented in fee. *Moe* v. *Confederated Salish & Kootenai Tribes, supra,* 48 L.Ed.2d at 108-110.

However, at the time the Rosebud statutes were enacted, the "title theory" was dominant. A congressman then would have assumed with the court in *Hollister* v. *United States, supra,* that each parcel ceased to be Indian country upon the extinguishment of Indian ownership. The term "diminished" would mean diminished in ownership, not boundaries, since ownership was then thought to be the significant jurisdictional factor. And the Indian ownership was not to end immediately but gradually, over many years. The Court recently recognized this use of the term "diminished" in a relevant context in *Moe* v. *Confederated Salish & Kootenai Tribes, supra,* 48 L.Ed.2d at 109-110:

> If the General Allotment Act itself establishes Montana's jurisdiction as to those Indians living on "fee patented" lands, then for *all* jurisdictional purposes—civil and criminal—the Flathead Reservation has been substantially diminished in size.
>
> * * *
>
> The State has referred us to no decisional authority—and we know of none—giving the meaning for which it contends to § 6 of the General Allotment Act in the face of the many and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands— . . . Congress by its more modern legislation has evinced a clear intent to eschew any such "checkboard" approach within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area.

Furthermore, it bears repeating that at the time of the Rosebud Acts, the Court had already clearly stated the essential difference between Indian lands purchased and paid for immediately and Indian lands opened to uncertain future sales. *Minnesota* v. *Hitchcock, supra.* The distinction drawn by that case is particularly significant in "title theory" terms.

For these reasons, contemporary references to "diminished" in connection with the Rosebud Acts do not evince a clear intent to terminate *immediately* those portions of the reservation. The Court has recently indicated that contemporary uncertainty as to the state of the law concerning Indian jurisdiction raises doubts about Congressional intent, which doubts should be resolved in the Indians' interest. *Bryan* v. *Itasca County,* —— U.S. ——, (No. 75-5027, June 14, 1976, 44 U.S. L.W. 4832, 4838).

The "title theory" also explains the inclusion in the 1910 Rosebud Act and some other allotment and surplus land statutes of a provision extending the Indian liquor laws to the opened territory for twenty-five years. 1910 Act § 10. Under the "title theory," parcels would avoid the Indian liquor laws and become wet islands as each parcel was sold and paid for. *Dick* v. *United States, supra.*

In this liquor provision, we again have the twenty-five year period expressed on the face of the act as the duration of federal protection over the area in question, an explicit indicator of Congressional intent as to when the reservation was to be terminated.

(3) SCHOOL LANDS. The Court of Appeals reasoned that inclusion of school lands grants to the State in each of the Rosebud statutes demonstrated an intent to terminate the opened areas of the Reservation. 521 F.2d at 100-101. However, to the extent one can conclude anything at all from these provisions, they support petitioner's position.

As previously noted, the Court in *Minnesota* v. *Hitchcock,* 185 U.S. 373 (1902), had decided that the Congressional choice of opening Indian reservations to uncertain future sales over outright purchase was crucial to school lands. In the future sales arrangement, the lands continued to be held in trust for the Indians until sold and never became public domain. When Indian lands were purchased outright, the school sections would automatically pass to the states, which were entitled to school sections on the public domain. Congress was surely aware of this decision, since it had enacted the special jurisdictional statute authorizing the Court to hear the case. 31 Stat. 950 (1901).

Under *Minnesota* v. *Hitchcock,* the South Dakota Congressmen knew their State would lose the school lands sections unless these were separately purchased outright and granted to the State. Thus they were fully aware of the importance of the change from purchase to opening in trust.

E. There Is No Sound Basis for a Finding That Congress Intended Immediate Termination of the Opened Portions of Rosebud.

Like all allotment acts, the Rosebud Acts intended the eventual assimilation of the Indians and removal of federal protection from them—which would include termination of the reservation.

Because of the later repudiation of the allotment policy, the crucial question has become whether the allotment and opening statutes intended to terminate the areas opened to settlement immediately or upon full consummation of the twenty-five year trust plan. Such intent is difficult to ascertain for several reasons. The difference was much less important then, since it was assumed that the reservation would be terminated within the forseeable future in any event. The boundary question was obscured by the "title theory" of Indian country under which a parcel of land ceased to be Indian country as the Indians' title was purchased. The important Indian cases of the day involved liquor control, where the "title theory" was applied.

The Rosebud Acts on their face do not support an intent to terminate the opened areas immediately. The Indians were not to be removed from these areas. In one area, the tribe retained the timber lands. 1910 Act § 4. The Government retained land in two of these areas for federal Indian agencies, schools, and missions. 1904 Act § 2; 1910 Act § 1. And the Indians continued to own the lands opened to homesteaders until such lands were actually sold and paid for, a process taking several years and leaving the Indians as trust owners of lands never sold. While the acts use words of cession, these are fully consistent with the interpretation that cession was to occur only to the extent of actual sales and payment in the future, parcel by parcel. The United States expressly disclaimed an intent to exercise its power to take the opened lands except for school sections. Since there was no immediate payment nor an immediate taking, there is no basis whatsoever for an

immediate extinguishment of the Indians' interest. These features closely parallel the operation of the statutes construed in *Mattz* and *Seymour*.

The principal reliance of the Court of Appeals to counter the factors just discussed was on the references to the diminished reservation. But the court failed to consider whether such references meant diminishment in ownership or in reservation boundaries, or whether such diminishment was to take place immediately or only upon full completion of the Government's plan for the opened area. We think it is clear from the historical context and the legislative history, as acknowledged by respondents' counsel, that Congress did not address the boundary question. Thus the term "diminished reservation" did not have the meaning attributed to it by the Court of Appeals.

For these reasons none of the Rosebud Acts exhibits the clear intent to effect an immediate termination of the affected areas required by the decisions of this Court.

CONCLUSION

For the reasons stated, amici respectfully urge this Court to reverse the decision of the Court of Appeals.

Respectfully submitted,

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